



United States of America  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
1120 20<sup>th</sup> Street, N.W., Ninth Floor  
Washington, D.C. 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

KILBY & GANNON CONSTRUCTION  
SERVICES, LLC,

Respondent.

OSHRC Docket No. 10-0755

APPEARANCES:

Matthew M. Sullivan, Esquire, New York, New York  
For the Secretary

Sean M. Wettig, Esquire, Albany, New York  
For the Respondent

BEFORE: Dennis L. Phillips  
Administrative Law Judge

**DECISION AND ORDER**

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected a worksite of Kilby & Gannon Construction Services, LLC (“Respondent” or “K&G”) in Troy, New York on February 5, 2010. As a result, OSHA cited K&G for two willful

violations of its excavations standard and proposed a total penalty of \$42,000.<sup>1</sup> K&G filed a timely notice of contest, bringing this matter before the Commission. In its answer to the Secretary's complaint, K&G admitted it is organized in and does business in New York as a domestic limited liability company engaged in construction work, specifically excavation work. K&G generally denied the remaining allegations and asserted ten affirmative defenses in its answer.<sup>2</sup> A two-day hearing was held in Schenectady, New York on April 6-7, 2011. Both parties have submitted post-hearing briefs.

### **Background**

K&G's primary place of business is Albany, New York. Hudson Valley Community College ("HVCC") hired U.W. Marx, Inc. ("Marx") as its construction manager to oversee the construction of a new 800-car parking garage at its campus ("worksite").<sup>3</sup> HVCC also hired LeChase Construction Services, LLC ("LeChase") as the prime contractor for excavation work, including the removal of existing drainage pipe and installation of new drainage pipe.<sup>4</sup> LeChase then subcontracted with K&G for the excavation work and utility installation at the worksite. Clough Harbour Associates ("CHA") was the architect of record that prepared the project's

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<sup>1</sup> The Secretary's complaint classified the citation items as both willful and serious. (Complaint at ¶¶ VII, VIII; Tr. 269).

<sup>2</sup> K&G listed ten affirmative defenses, numbered 1 through 10, in its answer: 1) failure to state a claim for which relief may be granted, 2) isolated employee misconduct, 3) good faith effort to protect employees from hazards, 4) violations were not willful, 5) K&G neither knew nor could have known of hazards, 6) provisions of the Act do not apply and the Commission has no jurisdiction, 7) the citations reference the wrong or invalid legal standards, 8) citations are unenforceably vague as applied, 9) citations fail to describe the nature of each alleged violation with sufficient particularity, and 10) compliance with the cited standards is infeasible or impossible. K&G has argued and/or briefed defenses 3 through 5 above. The Court finds that K&G has abandoned the remaining asserted defenses. *Manganas Painting Co., Inc.*, No. 93-1612, 1996 WL 478959, \*13 (O.S.H.R.C. A.L.J., Aug. 23, 1996)(consolidated) ("Respondent's failure to identify evidence or present any argument furthering its mere statement of an affirmative defense constitutes, for all practical purposes, an abandonment of the defense or, at least, a failure to carry its burden. The argument is rejected."), *aff'd on other grounds*, 273 F.3d 1131 (D.C. Cir. 2001).

<sup>3</sup> The worksite on HVCC's campus is located at 80 Vandenburg Avenue (U.S. Route 4) within the Town of North Greenbush, Rensselaer County, New York. The worksite was located north of South Drive and south of Brahan Hall, Fitzgibbons Center, and the Lang Technical Building. (GX 41).

<sup>4</sup> Much of LeChase's work at the worksite included placing rebar, pouring concrete and overseeing the excavation. (Tr. 125).

Grading and Drainage Plan, C-300, that was issued on March 24, 2008 (“Grading and Drainage Plan”). (Tr. 20-23, 37-38, 91, 160, 359; GX 44).

At 1:20 p.m., February 5, 2010, OSHA received a telephone complaint that employees were working in an unprotected trench at the worksite.<sup>5</sup> OSHA Compliance Officer (“CO”) Andrew Reed went to the worksite to investigate this complaint and found two K&G employees working in a trench. CO Reed took photographs of K&G employees in the trench from an adjacent building at the worksite. (Tr. 55-68, 277-78; GX 3-10, 39).

On the day of the inspection, there were five K&G employees on the site: Tom Gannon, foreman; Robert Shaw, foreman and excavator operator; Jim Romano, equipment operator; Chris King, laborer; and Andy Guthorn, laborer.<sup>6</sup> K&G was installing a 24-inch-diameter drainage high density polyethylene pipe between catch-basin five (“CB-5”) and an existing manhole at the worksite.<sup>7</sup> The west end of the trench, by CB-5, was approximately 5 feet deep. The trench was on a hill, so it became deeper at its east end. This portion of the drainage system represented the end of that phase of the project and “[K&G] wanted to get the thing in. It was a Friday.” (Stip. 3; Tr. 57, 98, 409-12; GX 38, pp. 61, 66, 78).

### **The Cited Standards**

#### **Citation 1, Item 1**

This item alleges a willful violation of 29 C.F.R. § 1926.651(c)(2), which states:

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<sup>5</sup> 29 C.F.R. § 1926.650(b) defines a trench excavation as “a narrow excavation (in relation to its length) made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench (measured at the bottom) is not greater than 15 feet (4.6 m). If forms or other structures are installed or constructed in an excavation so as to reduce the dimension measured from the forms or structure to the side of the excavation to 15 feet (4.6m) or less (measured at the bottom of the excavation), the excavation is also considered to be a trench.” The excavation here is a trench excavation because it was 50 to 60 feet long, its depth ranged between 5.5 to 7 feet, and its width, which varied, was not greater than 15 feet. (Tr. 86-89, 104). For clarity, the cited trench excavation will be referred to as a “trench.” Any other excavation on the HVCC worksite will be referred to as an “excavation.”

<sup>6</sup> Tom Gannon will be referred to as Foreman Gannon to avoid confusion with his brother, Bob Gannon. Bob Gannon is an officer for K&G. (Tr. 360-61).

<sup>7</sup> The existing manhole, marked with a letter “C” at GX 44, p. 2, is about 85 feet east of CB-5. (Tr.70-71; GX 44).

(2) *Means of egress from trench excavations.* A stairway, ladder, ramp or other safe means of egress shall be located in trench excavations that are 4 feet (1.22 m) or more in depth so as to require no more than 25 feet (7.62m) of lateral travel for employees.

*Citation 1, Item 2*

This item alleges a willful violation of 29 C.F.R. § 1926.652(a)(1), which states:

(a) *Protection of employees in excavations.* (1) Each employee in an excavation shall be protected from cave-ins by an adequate protective system designed in accordance with paragraph (b) or (c) of this section except when: (i) Excavations are made entirely in stable rock; or (ii) Excavations are less than 5 feet (1.52m) in depth and examination of the ground by a competent person provides no indication of a potential cave-in.

*Jurisdiction*

The parties have stipulated that K&G was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and 655(5).<sup>8</sup> The Court concludes the Commission has jurisdiction over the parties and subject matter in this case.

*The Secretary's Burden of Proof*

To establish a violation of an OSHA standard, the Secretary must prove that: (1) the cited standard applies; (2) the terms of the standard were violated; (3) one or more employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharm. Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981), *aff'd in relevant part*, 681 F.2d 69 (1<sup>st</sup> Cir. 1982).

*Stipulated Facts*

The following stipulated facts were set forth in the parties' Joint Pre-Hearing Statement:

1. The soils at the site had the OSHA designation of Class C soils.

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<sup>8</sup> The parties' Joint Pre-Hearing Statement stipulates that sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and 655(5), apply to K&G. (Tr. 354-55; GX 32, p. 4)

2. On February 5, 2010, Respondent's foreman Tom Gannon observed Andy Guthorn and Chris King, two of Respondent's employees, working inside of the excavation without a trench box, or a ladder to provide a means of egress from the excavation.
3. Robert Shaw was a foreman and competent person on the worksite on February 5, 2010.
4. Thomas Gannon was a foreman and competent person on the worksite on February 5, 2010.
5. Foreman Gannon gave the instructions to employees who were observed working inside the excavation on February 5, 2010.
6. Respondent had utilized cave-in protection at the worksite in connection with its work prior to February 5, 2010.
7. When Respondent started its excavation work near STMH # 4 prior to February 5, 2010, a representative from LeChase Construction Services, LLC asked whether Kilby & Gannon intended to use a shield in that portion of the excavation.<sup>9</sup>
8. No ladders were used in the excavation on February 5, 2010.

(Tr. 354).

### **The Relevant Testimony**

#### **CO Andrew Reed**

At approximately 2:00 p.m., CO Reed arrived at the worksite. He entered the Fitzgibbons Center building which was adjacent to and just north of the trench at issue. From that building's second floor stairwell, he observed and photographed a trench in which K&G was installing storm drainage pipes. The open trench was about 50 to 60 feet long and ran from the west to the east. Two employees, later identified as Chris King and Andy Guthorn, were working

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<sup>9</sup> STMH refers to a storm manhole on the site.

in the trench's deeper east end. One was working with a shovel. The other was holding a grade rod.<sup>10</sup> (Stip. 2; Tr. 55-60, 67-69, 245-46, 279-80; GX 3).

Several photographs taken by CO Reed show that Foreman Gannon was standing beside the trench observing Messrs. King and Guthorn as they worked in the trench's deeper east end.<sup>11</sup> One of the photographs [GX -7] shows Messrs. Deyo and Baker standing near one another adjacent to the trench. Another photograph [GX 10] shows Foreman Gannon in the trench. There was no trench box for cave-in protection and no ladder for a means of egress. A Kubota excavator was operating on the north edge of the trench. A front-end loader with a bucket full of crushed stone material was nearby. A Link-Belt excavator was removing soil at the trench's east end.<sup>12</sup> The CO testified that the large equipment near the trench introduced a surcharge load which reduced the stability of the soil. (Tr. 57, 60-68, 281-282, 340; GX 3-10).

After taking the photographs, CO Reed returned to his vehicle and drove closer to the trench area. As he approached, he saw Messrs. King and Guthorn still in the trench, but they had moved west to its middle section, about 15 to 20 feet east of CB-5. One employee was operating a vibratory tamping unit ("tamper") next to "fairly significant overhanging" soil on the south face of the trench.<sup>13</sup> The other employee was holding a shovel. (Tr. 69, 79-80, 286-87; GX 11, GX 15, GX 44).

CO Reed identified himself and asked who was in charge. Mr. Tom Gannon stepped forward and identified himself as the foreman and competent person. The CO asked if the

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<sup>10</sup> A grade rod is an incrementally-marked engineering rod that can be used to take measurements, such as a specific depth in a trench.

<sup>11</sup> CO Reed took photographs GX 3 - GX 10 over the course of less than 5 minutes. (Tr. 68-69; GX 3 - GX 10). Photograph GX 4 shows a K&G employee working in the east end of the trench, which was the project's deepest excavation by K&G. (GX 4, GX 38, pp. 78-79).

<sup>12</sup> Track marks on the ground at the east end of the trench, which are marked with an "A" on exhibit 4, were made by the tracks of K&G's Link-Belt excavator. (Tr. 61).

<sup>13</sup> CO Reed later learned that the overhanging face to the south extended almost the entire length of the trench prior to his arrival at the worksite. (Tr. 78). He testified that "there is no provision for allowing an unsupported overhanging face to remain at the edge of an excavation." (Tr. 339).

employees could get out of the trench, after which Messrs. King and Guthorn walked out of the trench's west end near CB-5. (Stip. 4; Tr. 70-72, 297-98).

When questioned by the CO about the lack of cave-in protection in the trench, Foreman Gannon answered that protection was not needed because no one was working in the eastern deep end of the trench. Because the CO had just photographed Messrs. King and Guthorn in the deep east end of the trench, he again asked if any employees had been working in that area. Foreman Gannon repeated that no employees had been working in the deep east end of the trench. When the CO showed him a photograph in the camera with Messrs. King and Guthorn in the deep east end, Foreman Gannon admitted the employees had been working in the deep east end of the trench. He admitted that the two workers had "just been in there for a few minutes to ... take some measurements."<sup>14</sup> (Tr. 71-72).

Foreman Gannon told CO Reed that the egress area was at the west end of the trench near CB-5. In their depositions, both Foremen Gannon and Shaw identified the egress point as being near CB-5 at the west end. The CO had identified that point as being the only safe means of egress for the two employees; however, they were working in the deep east end of the trench 40 to 50 feet away.<sup>15</sup> CO Reed testified that in order to exit the trench, the workers had to traverse the length of the trench and pass by a particularly hazardous overhanging face on the

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<sup>14</sup> After speaking with Foreman Gannon, CO Reed interviewed Messrs. Guthorn and King. They told CO Reed that they were laying pipe and backfilling. They told CO Reed that there was no reason that they should have to work in the excavation without any protection because it was dangerous. CO Reed stated that they seemed grateful that OSHA was looking out for them. (Tr. 245-46).

<sup>15</sup> CO Reed testified that he did not observe a stairway, any ladders, or a ramp within 25 feet of where he saw employees working as means of egress from the excavation. He further testified:

Q: ... How far would you estimate the employees would had to have traveled to get out of the excavation, from when you saw them from the window of the stairwell?

A: I'd say it was about 50 feet.

Q: How do you know it was that distance?

A: Well, it looked like there were two – I think as I recall two lengths of pipe installed in the trench. Those are 20 foot sections. And the employees were at the far end. ... beyond the end of the pipe taking a grade measurement or something. So I'd say 40 – 50 feet.

(Tr. 244-45).

excavation's south side. He stated that the workers could be exposed to a hazard of being struck, buried, or engulfed by collapsed material if a collapse were to occur. He stated that soil was "very heavy" and workers could suffer broken bones and internal injuries if they were struck mid-body by collapsed material. (Tr. 244-45, 269-71, 287, 329-30; GX 37, pp. 102-03, GX 38, pp. 98-99).

CO Reed used K&G's grade rod to take depth measurements. The first, which was 5.5 feet, was taken in the mid-section of the trench where the employees had been working with the tamper when CO Reed asked them to exit the trench.<sup>16</sup> The second, which was 7 feet, was taken toward the trench's deep east end where CO Reed, at the second floor stairwell, saw Respondent's employees, Messrs. Guthorn and King, working.<sup>17</sup> CO Reed testified that this measurement was taken where fill and material sloped downward toward the center of the trench and not at the deepest point in the trench which was deeper than seven feet. He also testified that the excavation would have been deeper since bedding material was placed below the pipe. Foreman Gannon was with the CO for both measurements, and he did not dispute them. CO Reed also testified that the excavation became deeper moving from west to east to allow water to flow through the pipe by gravity. (Tr. 86-90, 101-02, 245, 293-294, 331; GX 40, p. 1).

The CO observed that the walls of the east end had been cut back at about a 45-degree slope for a distance of 15 to 20 feet.<sup>18</sup> He estimated the trench was 6 to 8 feet wide at the top near CB-5 and "maybe 15 feet wide" in the eastern sloped area. The walls in the middle of the trench, where the employees had been with the tamper and the shovel, were vertical. An

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<sup>16</sup> The first measurement was taken from the excavation's north side down to the level where the fill had already brought the level up to the top of the pipe, where the shovel is leaning on the trench's north face in GX 17 at "F". (Tr. 87-88; GX 17).

<sup>17</sup> The second measurement was taken where the scraper blade is on the back of the excavator in GX 17 at "A". (Tr. 87-89).

<sup>18</sup> The degree of the slope was an estimate based on his observation, as well as his experience with inspections involving trenches. (Tr. 285-86).



overhang on the south wall in this same area is marked “B” in GX 11. The area marked “C” in GX 12 shows a portion of the south wall that had collapsed. CO Reed testified that the collapsed soil in the trench indicated that the soil may be “unstable.” He stated that, “It wasn’t a safe trench to enter.” CO Reed also testified that the excavation could be more dangerous and less stable because he observed “several pieces of heavy equipment that were located at various times close to the edge of the excavation.” (Tr. 79-85, 104-05, 244, 254, 285-88, 290, 292-93, 338-40; GX 17, 26).

Foreman Gannon told the CO the soil was type C. The foreman also said that K&G would normally slope back or use a trench box in type C soil.<sup>19</sup> He stated there was no trench box on site as they did not know the trench would be so deep. (Tr. 72).

CO Reed interviewed Respondent’s excavator operator, Mr. Shaw, during the inspection.<sup>20</sup> Foreman Shaw confirmed the soil was type C and that normally K&G would either slope the walls back or use a trench box. He told CO Reed that he was running the pipe from CB-5 to the manhole that was underneath the large Link-Belt excavator at that time. (marked “H” in GX 17). Foreman Shaw also observed a discussion earlier that day between Foreman Gannon and Mr. Wayne Deyo, an HVCC employee and representative who worked side by side with Marx on the project. Afterwards, Foreman Gannon told Mr. Shaw to cut back the walls of the trench at its east end “a little.” Foreman Shaw told the CO that K&G did not have a trench box at the site. He explained that this was because it was unrealistic to rent a trench box for a

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<sup>19</sup> Foreman Gannon told CO Reed that when working in type C soil, K&G “would require either shoring, or [a] trench box, or to cut it back or slope it back.” CO Reed testified that he later learned that K&G had removed shoring from the worksite. (Tr. 72).

<sup>20</sup> Mr. Shaw was also one of Respondent’s foreman and “competent person” at the worksite. A competent person is defined as: “. . . one who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them.” 29 C.F.R. § 1926.32(f). (GX 31, p. 13, GX 34, p. 11).

couple of hours of work on a Friday afternoon before Super Bowl weekend. (Tr. 26-27, 246-50, 319; GX 17, GX 38, p. 79).

Later that afternoon, Bob Gannon, one of K&G's owners, arrived at the worksite and met with CO Reed. CO Reed told Bob Gannon that there were four or five problems with the excavation; including a deep area that was not sloped appropriately, the absence of a trench box, vertical faces, undermined areas, and poor egress. Bob Gannon agreed there were safety problems with the trench, admitted that K&G's employees had gotten ahead of themselves on this project, and hoped OSHA would go easy on him. Bob Gannon told the CO that a trench box was ordered for the next work day, Monday. Near the end of his inspection, CO Reed, Wayne Williams, Marx's Project Manager, and Dennis Gilmore, Marx's Safety Director, looked at the trench. Mr. Gilmore told CO Reed that he [Mr. Gilmore] thought it was a pretty bad trench and K&G should know better.<sup>21</sup> CO Reed returned to the site the following Monday and found that a trench box was installed in the trench. (Tr. 252-56, 266, 302, 305-07).

After the inspection, CO Reed obtained a copy of the Grading and Drainage Plan. The Grading and Drainage Plan indicated the size of the structures to be installed, the elevations and contours of the existing terrain, and the lengths and depths of all excavations required to connect the new drainage pipes to the underground structures. The subject trench was for the installation of pipe between CB-5 and an existing manhole. Based on the Grading and Drainage Plan drawing, the CO testified the trench would need to be 5 feet deep for the CB-5 structure at the west end.<sup>22</sup> The CO further testified that the Grading and Drainage Plan drawing indicated the

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<sup>21</sup> Mr. Gilmore also told CO Reed that this should be an automatic willful. (Tr. 266).

<sup>22</sup> CO Reed testified that the Grading and Drainage Plan showed that CB-5 at the western end of the trench was at least about five feet deep. (Tr. 91-93, 99-100; GX-44).

east end of the trench would need to be at least 10 feet deep to connect a pipe to the existing manhole.<sup>23</sup> (Tr. 22, 90-95, 100-01; GX 44).

CO Reed concluded his direct testimony by explaining the basis for classifying the items as both willful and serious and how the proposed penalty amounts were determined. (Tr. 269-76). During cross examination, CO Reed testified that he was told by Messrs. Perrotti, Williams and Gannon that K&G was close to completing the project at the time of his inspection.<sup>24</sup> (Tr. 305).

During rebuttal, making reference to 29 C.F.R. Part 1926, Subpart P, App. B, CO Reed testified that OSHA's rule as to how employers are required to treat layered soil, where different soil types are present in an excavation, is to default to the least stable type of soil present within the layer. He testified that there was type C soil marked at "M" above the rock line on the north side of the excavation shown in photograph GX 17. He testified that the photograph showing the north side of the excavation "doesn't really depict stable rock, as far as layering is concerned." He also testified that where there is type C soil above rock, he would "expect that slope would be sloped back to a stable slope approximately one and a half on one" and that translates into 34 degrees. CO Reed testified that neither the north nor south sides of the excavation looked like they had been sloped to 34 degrees. (Tr. 448-51, 454; GX 17).

#### Wayne Williams

Wayne Williams, Marx's project manager at the site, was generally there every day.<sup>25</sup>

Mr. Williams verified the purpose of the Grading and Drainage Plan. He stated that the plan was

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<sup>23</sup> During his March 3, 2011 deposition, Mr. Shaw stated that the excavation at the manhole was seven and a half feet deep. (GX 38, pp. 68-69). Mr. Shaw did not testify at the hearing.

<sup>24</sup> During his March 3, 2011 deposition, Mr. Shaw stated that the project was "almost finished" by February 5, 2011. He stated that K&G only had to install an additional 60 linear feet of pipe in the excavation. (GX 38, p. 60).

<sup>25</sup> He was responsible for working with HVCC's facilities director, Mr. Steve Cowan, on facilities master plan projects that included about \$200 million in capital improvement projects at HVCC from 2008 to 2013. (Tr. 36-37, 41).

incorporated into the contract for the project and that all contractors had to use it to bid on the contract.<sup>26</sup> Mr. Williams identified Daily Work Logs prepared by Mr. Deyo and maintained by Marx, including one for February 5, 2010 that indicated that four K&G employees were working at the worksite.<sup>27</sup> He also identified an Inspector's Daily Report that was prepared by SJB Inspector Adam Baker for February 5, 2010. He testified that Marx was not responsible for overall worksite safety; each prime contractor had its own safety program. Mr. Williams further testified that on one occasion prior to OSHA's February 5, 2010 inspection he was contacted by either Mr. Deyo or an SJB inspector about an unprotected excavation by K&G near the southwest corner of the building at the worksite.<sup>28</sup> Mr. Williams was told that K&G was preparing to put a worker into an excavation that was "quite deep." He then contacted LeChase Superintendent Fred Perrotti to have him check the excavation.<sup>29</sup> Mr. Perrotti did so and a couple of days later told Mr. Williams that K&G set up a trench box to protect any worker entering the excavation. Mr. Williams testified that he visited the worksite and confirmed that a trench box was in place. (Tr. 19, 21-23, 26-32, 37-38, 44-45; GX 44, GX 46, GX 48).

Mr. Williams observed the cited trench later in the day, after the CO had finished his inspection. He saw an open trench which appeared to be 30 to 40 feet long and 5 or 6 feet deep. He noted the trench was deeper to the east, about 8 feet. He estimated the width of the trench was about four feet at the bottom and six to eight feet at the top. He did not see any trench boxes or ladders in the trench. Although he did not recall seeing a dirt ramp, he acknowledged that a

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<sup>26</sup> Mr. Williams testified that LeChase received a copy of the Grading and Drainage Plan; as well as the Geotechnical Investigation dated January 23, 2009 prepared by Tectonic before beginning the project. (Tr. 25; GX 41, GX 44).

<sup>27</sup> The Daily Work Logs showed the building's footprint, where work was being performed, and the number of workers performing it. (Tr. 28; GX 48).

<sup>28</sup> It was CO Reed's understanding that this incident occurred a few weeks before his inspection. (Tr. 251).

<sup>29</sup> Mr. Williams contacted LeChase as it was the prime contractor for the excavation work. The practice was for LeChase to thereafter contact K&G because it was LeChase's obligation to direct the work of its subcontractor. (Tr. 32-33, 46).

worker could probably walk out of the trench's west end near CB-5 with relative ease.<sup>30</sup> (Tr. 34-36).

Bernard Hassett

Bernard Hassett, an Engineering technician and employee of SJB Enterprises Services ("SJB"), performed soil and concrete testing at the HVCC worksite.<sup>31</sup> This included taking soil for compaction tests inside K&G's excavations. (Tr. 29, 112-13).

A few weeks before the OSHA inspection, Mr. Hassett saw a K&G employee, Kevin Lansing, at the worksite attempting to put an extension ladder inside an excavation for a catch basin or manhole that had no cave-in protection and was 16 to 18 feet deep.<sup>32</sup> Mr. Hassett asked Mr. Lansing if he was planning to climb down into the excavation where there was no shoring, benching or trench box, or anything to keep the soggy soil present from falling in. Mr. Lansing said he believed that he had to and he would be fired if he did not.<sup>33</sup> Mr. Hassett told Mr. Lansing he was going to report the excavation and to "stall" and not enter it. Mr. Hassett testified that he was later told that work was stopped in that area of the excavation until it could be shored up or benched properly. Mr. Hassett then called Mr. Williams, a Marx contact he reported to at the worksite.<sup>34</sup> Mr. Hassett recalled that Mr. Lansing thanked him later for telling

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<sup>30</sup> 29 C.F.R. § 1926.650(b) states that "Ramp means an inclined walking or working surface that is used to gain access to one point from another, and is constructed from earth or from structural materials such as steel or wood."

<sup>31</sup> SJB provides geotechnical and environmental drilling and construction testing services to clients in New York, and elsewhere. HVCC hired SJB to conduct special inspections and ensure the parking garage complied with New York's construction codes. Mr. Williams testified that at least one SJB inspector was at the worksite every day. (Tr. 28-29; GX 46).

<sup>32</sup> Mr. Hassett identified Mr. Lansing as a laborer. (Tr. 119).

<sup>33</sup> Mr. Hassett testified, in part: "I said are you going to go down there? And he said yeah, I have to. And I said, you know, you're crazy. I said it's dangerous. The hole was very deep. ... I'm guessing 16 to 18 feet deep. ... And so he said well I have to go down there. I said well if you do, you know, and something happens, do you want to lose your life over it? He said well if I don't go down there I'm going to get fired. ... So I said in the meantime try to like find something to do, or stall or whatever, because he was afraid, you know, not to go down there. He didn't want to get in trouble. But at the same time I was not going to, you know, let that happen, just in case something did happen, because there was no way of getting out of the hole if it collapsed. You couldn't do it." (Tr. 116-17).

<sup>34</sup> Mr. Hassett testified that he called Mr. Williams as he found the K&G foremen, Mr. Shaw and Foreman Gannon, unapproachable. (Tr. 121-22, 126).

someone about the excavation because he “was scared to go down there, but ... didn’t want to get fired.” (Tr. 115-21, 126-27).

Adam Baker

Adam Baker took over from Mr. Hassett as SJB’s Engineering technician and soil inspector at the site in early February 2010. On the day of the OSHA inspection, he arrived at the worksite at 7:00 a.m. to conduct soil compaction tests wherever K&G was continuing pipe.<sup>35</sup> Specifically, he was at the worksite to perform visual observation and in-place density tests on storm line backfill. He observed K&G loading a tractor trailer to remove a “dig box” and other items from the worksite.<sup>36</sup> He observed K&G placing the storm line in the trench. Later that morning, Mr. Baker refused to enter the trench to collect soil samples after he saw that the walls of the trench were basically straight and undermined. He told Foreman Gannon he would not go into an unsafe trench. Foreman Gannon did nothing in response. Mr. Baker then told Mr. Deyo about his concern. (Tr. 132-37, 142-43, 154-56). Mr. Baker testified:

They have already been stopped a couple of times. They got stopped by Bernie [Hassett] once and they got stopped by Wayne [Deyo] once. And then when it got to where I felt unsafe I just told [him] that they shouldn’t be in there and I don’t want to be in there. And Wayne told me it would be taken care of. And we went out and he had a talk with them. And that’s when they started to slope it a little bit. (Tr. 156).

Mr. Baker testified that the trench was about 10 feet at its deepest point. He recorded his observations and concerns in his February 5, 2010 Inspector’s Daily Report, noting the “[t]rench starts 45 foot east of CB-4 and ends 60 foot east of CB-5. Most of which was done with total disregard for specifications . . . [n]o dig boxes being used, trench is over 5 foot deep.” (Tr. 142-44, 173; GX 46).

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<sup>35</sup> This was his first day at the worksite. (Tr. 136).

<sup>36</sup> Mr. Baker described the “dig box” as a square box that could be used in an excavation around a manhole or a catch basin to protect workers. (Tr. 148-49).

Alfredo (Fred) G. Perrotti, III

Fred Perrotti, LeChase's superintendent at the site, was there on a daily basis. LeChase subcontracted the excavation work to K&G. This included digging excavations for the garage's foundation and storm drainage pipes. (Tr. 158-61, 362).

Mr. Perrotti testified that sometime before OSHA's inspection, Mr. Williams called him about a deep, unprotected excavation. Mr. Perrotti then went to the excavation and asked Foreman Gannon whether an employee would be working in it. Foreman Gannon told Mr. Perrotti no one had and that he was going to get a trench box, which was brought in the next morning. (Tr. 167-68, 176; GX 37, pp. 28-29). Respondent ultimately placed a piece of steel inside the excavation as shoring. (Tr. 186, 251, 255).

On the day of the OSHA inspection, Mr. Perrotti observed the trench while CO Reed was there. Mr. Perrotti estimated the trench to be 30 to 40 feet long, 9 to 12 feet deep, 20 or 24 feet wide at the top, and 4 or 5 feet wide at the bottom. Mr. Perrotti described that the trench's sloping began about 4 feet from the bottom. His Daily Quality Control Report for February 5, 2010, noted that the trench was not properly benched and there was no trench box. (Tr. 170-174; GX 47, p.2).

Wayne Deyo

Wayne Deyo, an HVCC employee, was assigned to observe the project on a daily basis.<sup>37</sup> He testified that about two weeks before OSHA's inspection he saw an excavation by K&G at the starting point for the drainage line at the west end of the worksite, identified with a "B" on GX 44, that he was concerned about. It was over 8 feet deep, and in one area it had a

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<sup>37</sup> Mr. Deyo worked at HVCC for about 28 years as an adjunct instructor and lab assistant with the civil engineering construction technology and physical plant departments. He has taught classes in surveying, construction materials, building construction, construction safety and drafting. He holds a civil engineering, technology two-year degree from HVCC. (Tr. 181, 196).

“squareish” structure box with a ladder inside it. The structure box was not a trench box. Mr. Deyo was concerned that someone might have been in the unprotected part of the excavation because of footprints in the soil. He saw no one inside the excavation at that time, but he notified Mr. Williams about his concerns. (Tr. 27-28, 181-82, 185-86, 197-98, 203-06; GX 44).

On the day of the OSHA inspection, Mr. Deyo first observed the trench after lunch. He testified that it was 8 to 10 feet, or more, deep at the east end, the top part of a wall was overhanging and “the walls of the trench [were] falling in underneath.” He told Foreman Gannon that the trench was unsafe and left a voice message with Mr. Williams to let him know that he was not going to let anyone get into the trench. He believed the trench posed an “imminent danger.” Mr. Deyo believed that K&G needed to bench the sides of the trench, as well as use a trench box. Mr. Deyo stated that the notes from his daily log showed that Foreman Gannon told him a trench box was not needed if no one was going into the trench. After this exchange, Mr. Deyo “went inside for a few minutes, and when [he] came back they benched the sides somewhat. It still was not safe but it was better than it was.” He testified that K&G still needed to step or cut the excavation further back. He believed that K&G cut the faces of the trench back because they were falling in by themselves and because of his expressed concern. After OSHA arrived, Mr. Deyo recorded his observations and interactions with K&G in his daily log by drawing a picture, which depicted the overhanging faces of the trench walls. Next to his drawing he wrote: “[t]rench unsafe[.] [f]alling in under frozen area[.] . . . I asked if they had a trench box[.] [r]eply don’t need one if we are not in trench. How do you like that.[?] After that they cut back the top[.] OSHA on site[.]” (Tr. 187-91, 199, 210-12, 226; GX 48, pp. 20-21).

Mr. Deyo testified that he observed K&G employees entering and leaving the trench, as well as working on the entire length of the pipe including at the deeper east end. He stated that



an employee could get out by exiting the shallower [west] end by CB-5. He indicated that an employee would still have to “jump up like 3 feet” and that there was not “a ramp or anything like that to get out.” He clarified that if employees walked out of the trench to the west of CB-5, it could be less than 3 feet. (Tr. 215-17, 225-26).

Dennis Gilmore

Dennis Gilmore, Marx’s safety director for the past five years, has taken multiple OSHA training courses and is an outreach safety trainer through Georgia Tech. He also served as the Director of Safety with Tougher Industries, a piping company that did “a lot of excavations,” for 15 years. Mr. Gilmore went to the HVCC worksite when he was notified that OSHA was there. He guessed that the trench’s depth was at least 5 to 6 feet.<sup>38</sup> He testified that he did not see any sloping or benching. Because the soil was undermined and dirt was falling in, he believed that it would not be safe for employees to enter and work in the trench.<sup>39</sup> Mr. Gilmore also testified that he saw no ladder, steps, or ramp in the trench. (Tr. 235-41).

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<sup>38</sup> Mr. Gilmore testified:

Q: Did you take any photographs?

A: No, sir.

Q: Did you take any notes or anything?

A: No, I just looked at the trench itself, starting on the far end where they began to dig it, then looking up towards the deeper end. I mean in my best judgment it was at least five to six feet deep. And it wasn’t that wide. That’s why I could tell there was no shoring or sloping.

(Tr. 240-41).

<sup>39</sup> Mr. Gilmore testified:

Q: How come it wouldn’t be [safe]?

A: Because of the frost line. You see that up above the trench level, right near the top where the frost level would go two feet down, that soil had been undermined and the trench was like dirt falling in. ...

Q: What does that indicate to you when you see a trench with dirt falling in?

A: It’s unsafe.

Q: Okay, Why is it unsafe?

A: Because you could get buried in there. It only takes a small amount of dirt to cover you up. ...

(Tr. 238-39).

James Kilby

James Kilby, K&G's general manager, testified that Bob Gannon was an officer for K&G and that Robert Shaw and Tom Gannon were the foremen for the HVCC project. He stated that K&G performed all phases of site work, including grading of land, utility installation, and parking lot construction. Mr. Kilby indicated that excavations were a major portion of K&G's work. He indicated that LeChase subcontracted with K&G to dig building foundations and install all the utilities and amenities for the HVCC project. He stated that K&G provides its employees with safety training and prepared a safety and health plan specifically for the HVCC worksite. He also stated that the written safety plan had limited information on excavation safety because K&G uses outside training for that topic.<sup>40</sup> (Tr. 360-63, 395-96, 400; GX 35).

Mr. Kilby further testified that he went to the worksite on February 8, the Monday following the OSHA inspection, to observe the assembly of the trench box and provide information to CO Reed.<sup>41</sup> He stated that the trench box was 8 feet tall with 20 foot long panels and five foot spreaders. Mr. Kilby testified that K&G owned 3 trench boxes; but stated that it rented trench boxes for use on the HVCC project as it did not own a trench box to put in manhole structures. Bob Gannon ordered a trench box the afternoon of CO Reed's inspection from A. J. Vel, LTD. He stated that OSHA had not inspected K&G prior to February 5, 2010. Mr. Kilby also testified that LeChase paid K&G an additional amount for rock excavated within the area 40 feet east of CB-5. (Tr. 364-70, 386-92; GX 17, 49, RX H).

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<sup>40</sup> Mr. Kilby stated that additional training was provided after the OSHA inspection, but he acknowledged that documentation of that training was not provided to the Secretary. (Tr. 401-02).

<sup>41</sup> He stated that he visited the worksite at least once a month. (Tr. 363).

Thomas (Tom) Gannon

Tom Gannon was a foreman and competent person for K&G at the worksite. He is hired seasonally by K&G, from December to April. He has been with K&G since it opened, about 6 years. He has been involved in excavation work for 16 years. He has also, for the past nine years, overseen excavations as a foreman for Callanan Industries (“Callanan”), a highway construction company. He has received in-house training from Callanan, and he has both led and attended tool box talks on workplace safety with K&G employees. (Tr. 406-08, 441; GX 37, pp. 11-16, 21, 26-27).

Foreman Gannon stated that there were five K&G employees at the worksite on February 5, 2010, himself and Messrs. Shaw, Romano, King, and Guthorn. Foreman Gannon testified that when CO Reed arrived at the site, K&G employees were in the trench using the tamper. He said the employees then exited the trench at CO Reed’s direction and that no more work was done in the trench that day. He contacted Bob Guthorn, K&G’s project manager, by telephone to notify him that an OSHA inspector was on site. Later, Bob Guthorn and Bob Gannon came to the worksite. Foreman Gannon was present when the CO took measurements of the trench with a grade rod. He did not disagree with CO Reed’s measurements of the trench. (Tr. 293-94, 411-17, 422-23, 426-28).

Foreman Gannon further testified that there were two full sections of pipe plus a “stub” of pipe in the trench. He said the total length of pipe in the trench was over 40 feet, since each full section of pipe was 20 feet long.<sup>42</sup> He testified that K&G employees were exiting the trench from the west end, by the CB-5 structure. He believed they could have also exited from the trench’s deeper east end. (Tr. 426, 428-29; GX 17).

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<sup>42</sup> Foreman Gannon could not give an estimate of the length of the “stub” portion of pipe. (Tr. 428-29).

Foreman Gannon stated that the south and east sides of the trench were sloped, as those areas were less stable. They did not slope the entire south side of the trench as the soil closer to the CB-5 structure was frozen. According to Foreman Gannon, the north side of the trench was composed of rock and frost, and it was “much more stable.”<sup>43</sup> He said the soil was frozen 2 feet down from the surface on both the north and south sides of the trench. He also said that a line of rock ran along the length of the trench on the north side.<sup>44</sup> (Tr. 418-21; GX 17).

Foreman Gannon remembered telling the CO the trench was in type C soil.<sup>45</sup> In his deposition, he stated it was K&G’s policy to treat all excavations as if they were in type C soil; he stated, however, that may not be what he personally believed.<sup>46</sup> He said he believed the trench was safe for an employee to work in since it was very stable to the north and cut back to the south.<sup>47</sup> Foreman Gannon admitted in his deposition that he knew the east end of the trench would be 10 feet deep, according to the Grading and Drainage Plan. He also admitted he knew, when digging a trench 5 feet or more in depth, that it was necessary to use a trench box. (Tr. 425-26, 433-36, 444-45; GX 37, pp. 33-36, 111-12, 121-26, GX 44).

Foreman Gannon stated that he was not aware of the need to finish a particular area of the drainage pipe project by February 5. He said he had been disciplined by K&G after the

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<sup>43</sup> Foreman Gannon said he knew of the rock on the trench’s north side as K&G had to excavate part of it. Mr. Kilby also testified that K&G had received additional payment for the excavation of rock in the trench to the east of CB-5. (Tr. 373-95, 421; RX H).

<sup>44</sup> Foreman Gannon indicated the location of the rock layer by drawing a line (“L”) on GX 17. He stated that there was no rock on the excavation’s south side. (Tr. 420-22, 437-38; GX 15).

<sup>45</sup> K&G admits that the excavation had been previously dug, backfilled, and compacted in accordance with the project specifications prior to February 5, 2010. (GX 32, p. 5).

<sup>46</sup> The Court noted that Foreman Gannon was evasive when answering questions during the Secretary’s cross-examination. This was particularly apparent when he answered questions about his previous statements to CO Reed, his deposition testimony, and his reasons for sloping or not sloping the trench.

<sup>47</sup> Foreman Gannon also testified that he previously testified at his December 8, 2010 deposition that he did not think that it was safe to walk in the trench down toward the east end beyond the pipe. (Tr. 445; GX 17, 37, pp. 126-27, 191).

inspection, but that no one at K&G told him why he was disciplined.<sup>48</sup> The discipline was two weeks off without pay. (Tr. 424, 439-41.)

**Citation 1, Item 1 – Alleged Willful Violation of § 1926.651(c)(2)**

K&G was engaged in excavation work to install a new drainage system at the HVCC worksite. The trench was at least 40 to 50 feet in length. The Secretary has established the trench was greater than 4 feet in depth. (S. Br. 10-11). Both parties agree that K&G employees were working in the trench on the day of the OSHA inspection. (Stip. 2). On the basis of the record, the Court finds that the cited standard applies to K&G's work at the site.

The cited standard requires a safe means of egress at no more than 25 lateral feet of travel. 29 C.F.R. § 1926.651(c)(2). The parties have stipulated that there was no ladder for egress from the trench. (Stip. 2). K&G contends that the west end of the trench was sloped enough to constitute a dirt ramp for employees to safely leave the trench. (R. Br. 11). The Secretary agrees that the west end of the trench provided a safe means of egress. (S. Br. 14). Here, K&G employees King and Guthorn were working in the east end of the trench. (Tr. 57-60; GX 3). The Secretary contends that an employee working at the east end would have to travel more than 25 feet to exit at the west end. (S. Br. 14). K&G contends an employee could have safely exited from both the west and east ends of the trench; therefore, an employee would not be farther than 25 feet from an exit. (R. Br. 11-12). For the reasons that follow, the Court finds the west end of the trench, by CB-5, was the only safe means of egress.

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<sup>48</sup> Foreman Gannon testified:

Q: That's not answering my question. Just please answer my question. You must have been told the reason why you were receiving two weeks of[f] with no pay. Can you just tell the Court –

A: Actually, no. I wasn't.

Q: Oh, so you're telling the Court –

A: I wasn't given a reason. It was –  
(Tr. 439).

K&G contends that the 45-degree slope at the east end of the trench was a safe means of egress.<sup>49</sup> K&G relies on Foreman Gannon's trial testimony to show that it was possible for employees to exit at the deep east end of the trench.<sup>50</sup> (R. Reply Br. 3-5; Tr. 426). CO Reed, however, testified that the east end of the trench was not a safe means of egress. (Tr. 298-99). While Foreman Gannon's testimony indicates he believed an employee could egress at the east end, no evidence was adduced to show an employee had used that area for exiting the trench. To the contrary, the employees exited at the west end of the trench.

K&G also relies on a prior Commission decision to support its contention that the sloping at the east end provided safe egress. *C.J. Hughes Constr., Inc.*, 17 BNA OSHC 1753, (No. 93-3177, 1996) ("*Hughes*"). (R. Br. 12). *Hughes* included testimony from an employee who had used the dirt ramp to walk upright from the trench. The Commission credited this testimony and found the Secretary had not provided adequate proof of a violation. *Id.* at 1754-56.

In contrast to the trench in *Hughes*, the trench in this case did not have a designated ramp at its east end.<sup>51</sup> Rather, it had walls sloped at 45 degrees.<sup>52</sup> No one attempted to use the east end of the trench as an egress point. Further, the trench in *Hughes* was 4.5 feet deep at its deepest point and 20 to 21 feet long. *Id.* at 1753. Here, the east end of the trench, which K&G contends was a safe egress point, was over 7 feet deep. As noted, while Foreman Gannon opined

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<sup>49</sup> K&G cites to *Kenko, Inc.* to support its position that a 45-degree slope is safe. *Kenko, Inc.*, No. 97-0925, 1998 WL 453638 (O.S.H.R.C. A.L.J., June 30, 1998) (ALJ found the dirt pile was safe egress because the compliance officer testified that he would have used it for egress.). Such is not the case here.

<sup>50</sup> Foreman Gannon testified:

Q: And Mr. Gannon, on February 5, 2010, how were employees – how were Kilby & Gannon employees getting in and out [of] that excavation?

A: They would come out by structure A [CB-5].

Q: Okay. And was there any other way for them to get out of the excavation?

A: They could go out down the other end by G there I believe.

Q: So when you say the other end –

A: The east end.

(Tr. 426).

<sup>51</sup> The Court finds that there was no ramp that permitted an individual to walk upright out of the east end of the excavation.

<sup>52</sup> CO Reed testified that the trench's east end was not properly sloped. (Tr. 285-86, 451).

that employees could have exited at the east end, CO Reed believed the east end of the trench did not provide a safe means of egress. (Tr. 88-90, 285-86, 288, 298-99, 426; GX 17; S. Br. 11, 15; R. Reply Br. 4-5; S. Reply Br. 2).

The Court credits the testimony of CO Reed over that of Foreman Gannon. CO Reed is an experienced OSHA CO who has inspected many trenches. Further, the Court observed the demeanor of these two witnesses on the stand and found the CO's testimony to be honest and forthright. Foreman Gannon, on the other hand, was evasive at times, and some of his testimony was simply not believable. Where the testimony of these two witnesses is in conflict, the testimony of CO Reed will be credited over that of Foreman Gannon.

In support of her position, the Secretary refers to an OSHA interpretive letter to describe the intent of the egress requirement.<sup>53</sup> (S. Reply Br. 2). The letter notes, for example, that an aluminum form is not a safe means of egress because of the "slipping, tripping, or falling risk." It states that 29 C.F.R. § 1926.651(c)(2) "contemplates a means of egress that permits a quick and easy means of escape in case of an emergency."<sup>54</sup>

An interpretation by the Secretary is given deference when it is reasonable, as long as it "sensibly conforms to the purpose and wording of the regulation[ ]."<sup>55</sup> *Union Tank Car Co.*, 18 BNA OSHC 1067, 1069 (No. 96-0563, 1997) (quoting *Martin v. OSHRC*, 499 U.S. 144, 151 (1991)). As noted, the preamble for the excavations standard states that the purpose of the egress requirement is to "provide employees working down in a trench with a safe means of escape

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<sup>53</sup> The letter references the preamble to the final rule for Subpart P (Excavations) and states that "[T]his requirement [29 C.F.R. § 1926.651(c)(2)] is intended to provide employees working down in a trench with a safe means of escape in case of an emergency." (54 Fed. Reg. 45,918, Oct. 31, 1989.)

<sup>54</sup> OSHA's May 11, 2004 letter of interpretation to Charles O. Engelken can be found at: [http://www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=INTERPRETATIONS&p\\_id=24839](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24839).

<sup>55</sup> Factors to consider in evaluating the reasonableness of the Secretary's interpretation are the consistency of the interpretation, quality of the policy rationale, and adequacy of notice. *Union Tank*, 18 BNA OSHC at 1069. OSHA's website reveals that this is the only interpretation of this particular regulation since the final rule's publication on October 31, 1989.

from the trench in case of an emergency.” 54 Fed. Reg. 45,894, 45,918 (Oct. 31, 1989). This point is further clarified in OSHA’s letter which notes that the egress point cannot have its own hazards (slipping, tripping) and must provide an escape from the trench excavation that is “quick and easy.” The Court finds that the Secretary’s interpretation is reasonable, and gives deference to that interpretation.

The Secretary asserts that the east end of the trench was not a safe means of egress. (S. Reply Br. 2). The Court agrees. The east end of the trench was not sloped for the purpose of providing egress for employees. Given the soil type and the angle of the east end, an employee would be subject to the risk of slipping or falling, which could prevent a safe escape from the trench in an emergency. The Court finds the east end of the trench was not a safe area for egress.<sup>56</sup>

The Secretary must demonstrate that employees had access to the cited condition. The Secretary may show employee access through either actual employee exposure, or by showing that “while in the course of their assigned working duties . . . [employees] will be, are, or have been in a zone of danger.” *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). The test of whether an employee would have access to the “zone of danger” is “based on reasonable predictability.” *Id.*; *Kokosing Constr. Co., Inc.*, 17 BNA OSHC 1869, 1870 (No. 92-2596, 1996) (citation omitted). There is no dispute that two K&G employees, Messrs. Guthorn and King, were working in the east end of the trench on February 5, 2010. As discussed *supra*, there was more than 25 feet of lateral travel from the nearest safe egress point. There was no stairway, ramp, ladder or other safe means of egress within 25 feet of where these

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<sup>56</sup> See *Pentecost Contracting Corp.*, No. 93-3788, 1995 WL 597426, at \*\* 7-8 (O.S.H.R.C. A.L.J., Oct. 6, 1995)(employees unable to walk upright out of the trench were not provided a safe means of egress).



two employees were working. (Tr. 244). The Court finds that employees were exposed to the cited condition.

Finally, the Secretary must prove the employer either knew, or with the exercise of reasonable diligence, could have known of the violative condition. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965 (No. 82-928, 1986). The employer's knowledge is established by a showing of employer awareness of the physical conditions that constitute a violation. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5<sup>th</sup> Cir. 1996). The Secretary need not show that an employer understood or acknowledged that the physical conditions were actually hazardous. *Id.* "The actual or constructive knowledge of a foreman or supervisor can be imputed to the employer." *N&N Contractors, Inc.*, 18 BNA OSHC 2121, 2123 (No. 96-0606, 2000) (citation omitted), *petition for review denied*, 255 F.3d 122 (4<sup>th</sup> Cir. 2001).

Knowledge of a hazard may be established where the violative condition and the presence of employees are in a conspicuous location, or are otherwise readily observable. *Kokosing Constr. Co.*, 17 BNA OSHC at 1871; *accord Hamilton Fixture*, 16 BNA OSHC 1073, 1089, 1094, 1097 (No. 88-1720, 1993); *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992). Here, the record shows that Foreman Gannon was at the worksite and that he was aware of the cited condition.<sup>57</sup> (Tr. 409-19; GX 17). The Court finds that through its foremen, K&G knew employees were working in the east end of the trench, more than 25 feet away from the safe egress point. The Secretary has established a violation of the cited standard.

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<sup>57</sup> K&G admits that Foreman Gannon instructed both of the exposed employees to enter and work inside of the trench on February 5, 2010. (Stip. 5). GX 11 shows Foreman Gannon standing inside the middle of the trench looking in the direction of the employees while they worked in plain view. Foreman Shaw, who operated the Link Belt that day, was also in a position to see the employees working conspicuously inside the trench. The knowledge of both of these foremen is imputed to K&G.

**Citation 1, Item 2 – Alleged Willful Violation of § 1926.652(a)(1)**

K&G was engaged in excavating a trench in order to install a new drainage system at the HVCC worksite. The trench was more than 5 feet in depth and it was not made entirely in stable rock. (S. Br. 10-11; Stip. 1). On the basis of the record, the Court finds that the cited standard applies.

The terms of the cited standard require employees to be protected from a cave-in by an adequate protective system. This can be accomplished through sloping, benching, or installing a trench box or other shield-type system. The parties have stipulated that K&G did not use a trench box or other shield-type system. They have also stipulated that the soil in the trench was type C. (Stip. 1-2). The parties further agree that the eastern part of the trench was sloped at approximately 45 degrees. (R. Br. 3; S. Br. 18-19). According to Appendix B of Subpart P, the slope for type C soil cannot be steeper than 34 degrees, or one and one-half horizontal to one vertical.<sup>58</sup> The Secretary has shown that the walls of the trench were not properly sloped. The Court concludes that the trench was in violation of the cited standard.

There is no dispute that two K&G employees were working in the trench on February 5, 2010. One employee was operating a vibratory tamping unit directly underneath an overhanging face on the south wall of the trench. (Tr. 69, 273-74, 284). The Court finds the Secretary has shown actual exposure of employees to the cited cave-in hazard. The parties stipulated that Foreman Gannon observed K&G employees working in the trench. (Stip. 2). Finally, as discussed *supra*, the Secretary has shown that K&G knew of the condition of the trench through Foreman Gannon. The Court finds the Secretary has established a violation of the cited standard.

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<sup>58</sup> In his testimony, CO Reed stated that the standard does not require stable rock to be sloped; sloping would begin with the soil above the rock layer. However, the rock layer in the trench would be included when determining the trench's depth. (Tr. 452-54).

### Whether the Violations are Willful

The Secretary has characterized both violations as willful. Courts have held that “a willful violation of the Act constitutes an act done voluntarily with either an intentional disregard of, or plain indifference to, the Act’s requirements.” *Conie Constr., Inc. v. Reich*, 73 F.3d 382, 384 (D.C. Cir. 1995), citing *Ensign-Bickford Co. v. OSHRC*, 717 F.2d 1419, 1422 (D.C. Cir. 1983). A willful violation differs from a serious violation by a heightened awareness and either conscious disregard or plain indifference. *Williams Enterp., Inc.*, 13 BNA OSHC 1249, 1256-57 (No. 85-355, 1987). The Second Circuit, in which this case arises, has adopted the Commission’s and OSHA’s definition of a willful violation as one “done either with an intentional disregard of, or plain indifference to, the statute.” *A. Schonbek & Co. Inc. v. Donovan*, 646 F. 2d 799, 800 (2d Cir. 1981).<sup>59</sup> An employer that consciously disregards an OSHA standard acts willfully even though it believes in good faith that the violation is not hazardous to employees. *Secretary v. Capital City Excavating Co., Inc.*, 712 F.2d 1008, 1010 (6<sup>th</sup> Cir. 1983). The Commission has held that a foreman who knowingly allows employees to work without the necessary protective equipment has acted with intentional disregard. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081-82 (No. 99-0018, 2003).<sup>60</sup>

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<sup>59</sup> The Second Circuit joined many other Courts of Appeals that had approved a similar definition of willfulness. *See, e. g., Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1167 (3d Cir. 1980); *National Steel & Shipbuilding Co. v. OSHRC*, 607 F.2d 311, 313-16 (9th Cir. 1979); *Georgia Elec. Co. v. Marshall*, 595 F.2d 309, 318 (5th Cir. 1979); *Kent Nowlin Constr. Co. v. OSHRC*, 593 F.2d 368, 372 (10th Cir. 1979); *Cedar Constr. Co. v. OSHRC*, 587 F.2d 1303, 1305 (D.C. Cir. 1979) (*per curiam*); *Empire-Detroit Steel Div. v. OSHRC*, 579 F.2d 378, 384-85 (6th Cir. 1978); *Western Waterproofing Co., Inc. v. Marshall*, 576 F.2d 139, 143 (8th Cir.), *cert. denied*, 439 U.S. 965 (1978); *Intercounty Constr. Co. v. OSHRC*, 522 F.2d 777, 779-80 (4th Cir. 1975), *cert. denied*, 423 U.S. 1072 (1976); *F.X. Messina Constr. Corp. v. OSHRC*, 505 F.2d 701, 702 (1st Cir. 1974).

<sup>60</sup> K&G cites to *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1<sup>st</sup> Cir. 1987), to support its premise that its conduct was neither so egregious nor so life-threatening as to apply an objective standard of willfulness. (R. Br. 7). The comparison to *Morello* is misplaced. In *Morello*, the First Circuit did not establish a new threshold for willfulness, but instead was determining the standard needed for a court of appeals to “require[] the agency to find willfulness when the fact-finder itself had found the contrary.” The *Morello* court did not state that an “objective” standard was the threshold for willfulness; the court was positing that when the hearing officer finds the violation to not be willful, an objective standard might then be used for a court of appeals to require a finding of willfulness.

The Court finds that K&G knowingly violated 29 C.F.R. § 1926.651(c)(2). K&G’s own safety program requires an employee to be familiar with and comply with OSHA’s construction standards.<sup>61</sup> (GX 35, p. 11-12). Foreman Gannon verified that he was trained to comply with OSHA regulations when working for K&G and that a safe means of egress meant a ladder, sloping, or at the clear end away from the trench. (GX 37, pp. 36-37). K&G has stipulated that Foreman Gannon observed employees working in the trench. (Stip. 2). The Court finds that K&G was aware of the cited standard and the condition of the trench.

The Court also finds that K&G had heightened awareness of the standard’s egress requirement. Foreman Gannon admitted a ladder had previously been used for egress at the HVCC worksite. He was familiar with the Grading and Drainage Plan drawings, which indicated the expected length for the trench that day to be “85 LF” [linear feet]. (Tr. 22-23, 91; GX 37, pp. 33, 121-22, 142-43, GX 44).

K&G contends that its conduct was not willful because the trench was not 10 feet deep for its entire length. Further, it believes employees could have exited at the east end of the trench and that the expected length, based on the Grading and Drainage Plan drawing at GX 44, was not relevant. (R. Reply Br. 5-6). The assertion that the trench was not 10 feet deep for its entire length is not dispositive on the issue of safe means of egress; the requirement applies to a trench that is 4 feet or greater in depth. The Grading and Drainage Plan drawing at GX 44 demonstrates

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The Court also stated that “an act may be ‘willful’ if the offender shows ‘indifference to the rules; he need not be consciously aware that the conduct is forbidden at the time he performs it, but his state of mind is such that, if he were informed of the rule, he would not care.” *Id.* Here, even though Foreman Gannon knew of the standards, he did not care to comply with them even when warned by Messrs. Baker and Deyo during the morning of February 5, 2010.

<sup>61</sup> “Safety Rules and Procedures That You Should Follow Include:

.....  
9. Become familiar with OSHA 29 CFR 1926, construction industry regulations, which will be supplied to you. Comply with these regulations on all job sites as well as other federal and/or state safety and health laws and regulations.” (GX 35, pp. 11-12).

K&G's advance notice that the trench's length would be greater than 25 feet.<sup>62</sup> As discussed *supra*, the Court was not persuaded by Foreman Gannon's testimony that the east end of the trench was a safe area for egress.

The Court also finds that K&G knowingly violated 29 C.F.R. § 1926.652(a)(1). As noted *supra*, K&G was aware of OSHA's construction standards through its safety program and training. K&G has stipulated that Foreman Gannon observed employees working in the trench. (Stip. 2). Foreman Gannon knew that the eastern end of the trench, beyond the end of the pipes that had already been laid, was deeper than 5 feet and was not safe to work in without a trench box. (GX 37, pp. 34-36). Foreman Gannon was also aware that it is necessary to use a trench box when digging 5 feet or more into the ground. (Tr. 71; GX 37, pp. 120, 123). The Court finds K&G knew of the cited standard and the trench's condition.

The Court further finds that K&G had a heightened awareness of the cited standard. K&G admits it had previously used trench boxes or shields on the worksite. (Stip. 6; R. Reply Br. 9). In their depositions, Foremen Gannon and Shaw testified as to their knowledge that a trench needed to have a trench box or be properly sloped. (GX 37, p. 123; GX 38, pp. 21-22). K&G also had the Grading and Drainage Plan drawing which indicated the expected depth of 5 to 10 feet for the trench. (Tr. 91-93, 100-01; GX 44).

Foreman Gannon was reminded about the use of a trench box for previous HVCC excavations, and had a discussion with Mr. Deyo about the trench on the day of the inspection.<sup>63</sup> (Tr. 91-94, 190-91). Just a few weeks before the OSHA inspection, Foreman Gannon had been

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<sup>62</sup> The Grading and Drainage Plan indicated the size of both existing and new structures that needed to be installed, the elevations and contours of the existing worksite terrain, and the lengths and depths of all excavations that would be dug to connect the new drainage pipes to the underground structures. (Tr. 22-23, 90, 97, 164, 166; GX 44).

<sup>63</sup> K&G contends that the discussions between K&G employees and non-party witnesses about the use of a trench box in previous excavations at the site are not relevant as employees never worked in those excavations without cave-in protection. (R. Reply Br. 8-9). The Court finds these previous discussions are relevant to show a heightened awareness of the requirement to use a protective system in a trench.

warned to use a trench box to protect Mr. Lansing from working in an unprotected excavation. On the morning of February 5, 2010, Foreman Gannon was again told of an unprotected excavation by Messrs. Deyo and Baker. The Court finds the testimony of Messrs. Hassett, Baker, and Deyo, each of whom provided detailed accounts of their interactions with Foreman Gannon, to be credible. All three describe K&G as being dismissive of employee safety. The action taken by Foreman Gannon in response to these warnings was minimal as found a few hours later by CO Reed. The trench was left in practically the same violative condition observed by CO Reed when he first arrived at the worksite. The evidence demonstrates that K&G had a heightened awareness of the need for cave-in protection for the trench at the worksite at the time of OSHA's inspection. Foreman Gannon knew that cave-in protection was required, but nevertheless ordered employees to work inside the unsafe trench anyway. The Court finds that the evidence shows that K&G was actually aware, at the time of the violative acts set forth in the citation items, that these acts were unlawful.<sup>64</sup>

K&G asserts it made a good faith attempt to comply with the standards, which negates a willful characterization. (R. Br. 13-15). "If an employer has made a good faith effort to comply with the Act's requirements, a finding of willfulness is not justified, even though the employer's efforts are not entirely effective or complete." *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541 (No. 86-360, 1992). K&G bears the burden of proof as to showing good faith. *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1127 (No. 88-572, 1993). An employer's subjective belief that it is in compliance with OSHA standards is not sufficient to overcome a finding of willfulness. The test is "an objective one -- whether the employer's belief

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<sup>64</sup> See *AJP Constr., Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (quoting *Sec'y of Labor v. Propellex Corp.*, 18 BNA OSHC 1677, 1684 (No. 96-0265, 1999))(to sustain a willful violation, "[t]he Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care.").

concerning a factual matter or concerning the interpretation of a standard was reasonable under the circumstances.” *Williams Enterp., Inc.*, 13 BNA OSHC at 1259. “[A]n employer is not necessarily spared from a finding of willfulness by taking *any* measure, regardless of how minimal, to enhance employee safety.” *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2209 (No. 87-2059, 1993) (emphasis in original).

With respect to Citation 1, Item 2,<sup>65</sup> K&G asserts that good faith is demonstrated by: Foreman Gannon’s belief the trench was safe, the partial sloping of the trench, the trench’s depth being greater than expected, and K&G’s abatement of the cited condition immediately after the inspection. (R. Br. 13-14). As discussed *infra*, the Court finds that K&G’s efforts were not sufficient to mitigate the willful characterization of this citation item. When confronted by Mr. Deyo on the morning of February 5, 2010, Foreman Gannon told Mr. Deyo that a trench box was not needed because no worker was going into the trench. This was untrue, just as Foreman Gannon’s initial denial to CO Reed was untrue. These denials do not reflect good faith. Similarly, the Court finds that Foreman Gannon’s minimal effort to cut back the excavation after being told by Messrs. Deyo and Baker that the trench was unsafe was not a good faith effort to comply with the standards or eliminate the hazards.<sup>66</sup> The Court finds that the evidence shows that Foreman Gannon did not have a good faith, reasonable belief that the trench was safe at the time of CO Reed’s inspection.

K&G contends that sloping the walls of the trench shows a good faith attempt at

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<sup>65</sup> K&G offers little to show good faith regarding Citation 1, Item 1. It relies on Foreman Gannon’s testimony as to a possible egress point at the east end of the trench. It also notes the trench was only 40 to 50 feet long instead of the expected 85 feet. (R. Br. 11; R. Reply Br. 5). This evidence is insufficient to overcome the evidence establishing that the violation was willful.

<sup>66</sup> See e.g., *Caterpillar Inc.*, 17 BNA OSHC 1731, 1733 (No. 93-373, 1996)(inadequate measures taken), *aff’d* 122 F.3d 437, 441-42 (7<sup>th</sup> Cir. 1997); *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875-76 (No. 91-1167, 1994) (efforts did not “rise to the level of good faith sufficient to negate willfulness”). See also *Secretary v. Union Oil*, 869 F. 2d 1039, 1047 (7th Cir. 1989) (employer’s belief must have been “nonfrivolous.”), citing *Brock v. Morello Bros. Const., Inc.*, 809 F.2d 161 (1<sup>st</sup> Cir.,1987).

compliance. As noted *supra*, type C soil requires a slope of no more than 34 degrees. In the trench at issue, the east end was sloped at roughly 45 degrees. The trench's other walls were almost vertical, and in one area, there was a soil overhang. Because the requirement for type C soil is a maximum slope of 34 degrees, it is not objectively reasonable to believe that sloping one area of the trench at 45 degrees, while leaving the other walls nearly vertical, constitutes compliance with the requirements of the standard.

K&G also contends its foreman had a good faith, reasonable belief that the trench was safe due to the presence of some rock and frozen soil. (R. Br. 14-15).<sup>67</sup> Here, the excavation was not made “*entirely*” in stable rock as required by the exception at 29 C.F.R. § 1926.652(a)(i). CO Reed testified, and the photographs establish, that the excavation was not entirely in stable rock. The southern trench wall had also partially collapsed. *See Secretary v. Ford Dev. Corp.*, 15 BNA OSHC 2003, 2010-11 (No. 90-1505, 1992) (finding that the fact that a trench wall had broken down in some way demonstrates its instability and holding solid rock exception unavailable); *Woolston Constr. Co.*, 15 BNA OSHC 1114, 1117 (No. 88-1877, 1991), *aff'd* No. 91-1413, 15 BNA OSHC 1634 (D.C. Cir. 1992) (“A trench wall composed of materials of differing strengths is only as stable as its weakest component.”). Foreman Gannon’s lack of good faith is further demonstrated by his initial denial to CO Reed that K&G workers were not working in an unprotected excavation. Foreman Gannon only admitted that his denial was

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<sup>67</sup> K&G notes that the trench did not collapse over a three-day period and urges that it was reasonable to believe the soil was stable and safe. (R. Br. 15). This argument is rejected. The standard does not require that a trench be in imminent danger of collapse to merit cave-in protection for employees. CO Reed testified that it would be like “playing Russian roulette with a loaded gun” for an employer to assume that because a portion of overhanging soil in an excavation may be frozen the likelihood or probability of it collapsing would be reduced. CO Reed further testified that “relying on the fact that the soil is frozen for protection of your employees would be I think a serious mistake.” He also stated that “generally, OSHA does not consider the fact that the soil was frozen to reduce the probability of a collapse hazard, due to the fact that it’s largely random and just not a reliable means of protection.” (Tr. 324).



misleading after he was shown photographs, taken minutes before, that showed K&G employees actually working in the unprotected excavation.

K&G refers to Mr. Deyo's testimony in an attempt to show that Foreman Gannon's belief that the trench was safe is objectively reasonable. (R. Reply Br. 9-11). On February 5, 2010, Mr. Deyo saw employees working in the trench's west end, where the walls were vertical. He discussed his concerns about the safety of the trench with Foreman Gannon. K&G then sloped the east end of the trench. Mr. Deyo testified that he still believed the trench was unsafe, but he took no further action as he knew OSHA was on its way. (Tr. 189-191, 212-13). This shows that Mr. Deyo did not share Foreman Gannon's belief that the trench was safe. The Court finds that Foreman Gannon's belief the trench was safe is not objectively reasonable.

Additionally, K&G urges that Foreman Gannon did not expect the trench to be so deep. (R. Br. 13). However, in his deposition, Foreman Gannon acknowledged he had seen the Grading and Drainage Plan drawing which indicated the trench's anticipated length and depth. He also admitted that the trench's deep end would require shielding or shoring as it would be about 10 feet deep. (GX 37, pp. 33-36, 145-46, GX 44). CO Reed testified that, based on the Grading and Drainage Plan drawing, the anticipated depth of the trench would be at least 5 feet near CB-5 and 11 feet by the existing manhole. (Tr. 91-95; GX 44). This evidence shows that K&G had an expectation that the trench would need cave-in protection to comply with OSHA requirements. It is not objectively reasonable for Foreman Gannon to believe the depth was such that no type of cave-in protection would be needed. Foreman Gannon testified that "I knew I needed a trench box to get into this structure," referring to the area in the trench beyond the end of the pipe that is seen, for example, in the photograph at GX 14. Foreman Gannon explained that ". . . at this point you'll see the grade is changing fast. And at the structure, it's very deep.

Well you can read it [the Grading and Drainage Plan]. It's deep. It's 10 feet deep. So I knew we would need shoring at that point." Similarly, Foreman Shaw testified that K&G had anticipated using an 8 foot trench box in the deep east area where the employees worked beyond the two installed pipes, but the company did not have an appropriately sized trench box at the worksite to use. Foreman Shaw acknowledged that K&G was aware of the need for an 8 foot trench box inside this trench before OSHA's inspection. Despite knowing employees should not work inside the deep end of the trench without a trench box, Foreman Gannon instructed K&G employees to go inside and work. (Stip. 5; GX 14, GX 37, pp. 34-36, GX 38, p. 78; S. Br. 20-21).

K&G asserts that "there is simpl[y] no basis to conclude that Kilby & Gannon did not rent a trench box prior to the inspection because it was the Friday before [Super Bowl] weekend." (R. Reply Br. 12). The trench "was not on the project's critical path and . . . was on schedule." (R. Br. 14). This assertion is contradicted by K&G's excavator operator, Mr. Shaw. In his deposition, Mr. Shaw stated that this particular area of the drainage system represented the end of that phase of the project and "[K&G] wanted to get the thing in. It was a Friday." (GX 38, pp. 61, 66). During the inspection, Mr. Shaw told CO Reed that K&G was not going to get a box for a couple of hours of work on the Friday before the Super Bowl weekend. This was a deviation of K&G's normal practice described by Mr. Shaw to either slope the walls or use a trench box. (Tr. 246-50, 319-20).

Finally, K&G asserts that ordering a trench box the afternoon of the OSHA inspection and using it the following work day demonstrates good faith. (R. Br. 13-14). The Commission has found that post-inspection abatement "while commendable is simply not sufficient to negate willfulness." *Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1894 (No. 92-

3684, 1997), *aff'd*, 131 F.3d 1254 (8<sup>th</sup> Cir. 1997). The Court finds ordering a trench box after OSHA started its inspection is insufficient to demonstrate good faith.<sup>68</sup>

For all of the above reasons, K&G has not met its burden of showing good faith in order to negate the willful classification of the violations in this case. The Court finds that the evidence shows that K&G did not have a good faith, reasonable belief that its conduct relating to the citation items conformed to the law. The Court further finds that K&G did not make a good faith effort to comply with the Act's requirements. The Court finds the Secretary has properly characterized the violations as willful.<sup>69</sup> Items 1 and 2 of Citation 1 are affirmed.<sup>70</sup>

### **Penalty Determination**

Section 17(j) of the Act, 29 U.S.C. § 666(j), requires the Commission to give due consideration to four criteria in assessing penalties: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history of violations. In *J.A. Jones Constr. Co.*, 15 BNA OSHC at 2214, the Commission stated:

These factors are not necessarily accorded equal weight; generally speaking, the gravity of a violation is the primary element in the penalty assessment. [Citations omitted]. The gravity of a particular violation, moreover, depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. [Citation omitted].

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<sup>68</sup> K&G cites to *Keco Indus., Inc.*, 13 BNA OSHC 1161 (No. 81-263, 1987) and *B&B Plumbing, Inc.*, No. 99-0401, 2000 WL 781361 (O.S.H.R.C. A.L.J., June 9, 2000) to bolster its good faith argument. The first case, a Commission decision, has facts very different from those here and does not avail K&G. There, the Commission found that Keco did not ignore the requirements of the abrasive blasting standard at issue. *Id.* at 1169. Likewise, the second case does not avail K&G. In *B&B Plumbing, Inc.*, Judge Goldstein found that the applicable blueprints called for a four foot deep trench and Respondent's principal was surprised to learn that a portion of the trench was deeper than five feet. Judge Goldstein also found that there was no evidence of instability in the trench and no problem with sloughing off. *B&B Plumbing, Inc.*, 2000 WL 781361, at \*\* 2, 4.

<sup>69</sup> In its post-hearing brief, Respondent asserts that Citation 1, item 2 (cave-in protection) should be classified as a serious violation with a reduction in the penalty to \$2,100. (R. Br. 1).

<sup>70</sup> The Secretary alleged the cited violations as both willful and serious. The Court finds the cited violations were also serious violations within the meaning of § 17(k) of the Act. The Court affirms the citation items as both willful and serious as alleged by the Secretary. *See General Motors Corp.*, 22 BNA OSHC 1019, 1042 (Nos. 91-2834E & 91-2950, 2007).

In *Calang Corp.*, 14 BNA OSHC 1789 (No. 85-0319, 1990), the Commission recognized that a violation of the “OSHA trenching requirements warrants a substantial penalty because the incidence of cave-ins is high, and the likelihood of death or severe injury to employees in a collapsing trench is also high.” *Id.* at 1794. *See also Performance Site Mgmt.*, 21 BNA OSHC 2115, 2120 (No. 06-1457, 2007) (“A cave-in of an excavation in excess of 5 feet in depth could cause serious injury or death of an employee in the excavation.”).

The Secretary has proposed a penalty of \$21,000 for each of the willful violations.<sup>71</sup> CO Reed testified that because a cubic yard of soil weighs over 2,500 pounds, which can cause serious injury or death in the event of a cave-in, both citations were rated at a high severity. Both of the violations were rated at a “greater” probability. This was based on the significant distance the employees would need to travel from the east end of the trench to the egress point, plus the overhanging face of the trench they would pass by in doing so. The cave-in probability was increased due to the near-vertical walls in the non-sloped area of the trench, the overhanging face in a part of the trench, and the operation of equipment including the excavator and the tamper. (Tr. 273-74, 287, 321-23, 329-30). The Court has considered the CO’s testimony and agrees with the Secretary’s gravity assessment.<sup>72</sup>

The Court has also considered K&G’s size, history, and good faith. K&G is a small employer with no prior OSHA citations. In light of the willful nature of the violation, no credit for good faith is due.<sup>73</sup> The Court finds that the 60 % penalty reduction for company size and 10

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<sup>71</sup> OSHA based the \$21,000 penalty on the statutory maximum of \$70,000 (given the high severity and greater probability) reduced by 70% (60% for company size plus 10% for history).

<sup>72</sup> K&G contends that the gravity should be less because the width of the trench made it easier to travel through in an emergency and the sloping of a portion of the trench, along with some rock and frozen soil, made the soil more stable. (R. Reply Br. 14-15). The Court finds that these circumstances do not justify lowering the gravity.

<sup>73</sup> K&G also contends that a penalty reduction for good faith should be applied based on its safety program, its immediate abatement of the hazards, further employee training after the inspection, and the discipline of Foreman Gannon. (R. Br. 10-11). The Court has considered these circumstances. However, no evidence was adduced to

% penalty reduction for history is appropriate. OSHA has already taken these factors into account in the proposed penalty of \$21,000 for each citation item. The Court finds the proposed penalty appropriate. A penalty of \$21,000 for each item is accordingly assessed. (Tr. 275-76, 326-27).

**Findings of Fact and Conclusions of Law**

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

**ORDER**

Based upon the foregoing findings of fact and conclusions of law, it is **ORDERED** that:

1. Citation 1, Item 1, alleging a willful and serious violation of 29 C.F.R. § 1926.651(c)(2), is AFFIRMED, and a penalty of \$21,000 is assessed.
2. Citation 1, Item 2, alleging a willful and serious violation of 29 C.F.R. § 1926.652(a)(1), is AFFIRMED, and a penalty of \$21,000 is assessed.

/s/  
\_\_\_\_\_  
The Honorable Dennis L. Phillips  
U.S. OSHRC Judge

Dated: April 13, 2012  
Washington, D.C.

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document the additional training, and Foreman Gannon testified that he was not sure why he was disciplined. In view of the record, there is no justification for a reduction for good faith.